

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-7017

To be argued by
MORRIS CIZNER
OR
MARTIN LASSOFF

b
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

PETER RUFFINO,

Plaintiff-Appellant,

—against—

SCINDIA STEAM NAVIGATION Co., LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHEASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

PETER RUFFINO,

Plaintiff-Appellant,

—against—

SCINDIA STEAM NAVIGATION CO., LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

Statement

This is an appeal from an Order and Judgment in favor of the defendant entered on December 10, 1976 dismissing the complaint on the merits.

This case was tried before Judge Lee P. Gagliardi and a jury on October 12, 13, 14 and 15, 1976 and the jury returned a verdict in favor of the plaintiff in the sum of \$60,000.00, and a Judgment No. 76941 in favor of the plaintiff against the defendant in said sum was entered on October 20, 1976.

Thereafter defendant's motion for judgment notwithstanding the verdict was made and was granted by Judge Gagliardi on the grounds that there was no testimony pre-

sented which would permit an inference that shipowner had any notice, actual or constructive. He, therefore, vacated said Judgment No. 76941 in favor of the plaintiff and dismissed the complaint on the merits with prejudice and costs. The judgment in favor of defendant was entered on December 10, 1976. It is from this Order and Judgment that plaintiff appeals.

The Testimony

Plaintiff, a longshoreman employed by Pittston Stevedores was discharging cargo from the tween deck of Hatch No. 6 of defendant's vessel on January 29, 1974 when he was injured (4a-5a).^{*} Claim was made that due to the large spaces between the cargo of palletized tea with no dunnage or plywood flooring on top of same, a rolled carpet stowed on top of the tea sank into a space when stepped upon by the plaintiff, causing him to fall (15a, 18a).

When plaintiff and the other longshoremen were sent to the hatch at about 8:15 A.M., the ship's crew was engaged in opening up the hatch. Plaintiff descended into the hatch at about 8:30 A.M. and commenced discharging cargo from the forward part of the square. The cargo consisted of palletized chests of tea and rolled carpets (6a-8a).

The carpets varied in length, generally 10-12 feet long and 15-18 inches in diameter (18a, 45a). They were stowed fore and aft (58a, 117a). The pallets of tea were about 3-4 foot square and 5½-6 foot high. There were 96 carpets and 38 pallets of tea stowed in the forward one-third of the square, the inshore wing and part of the offshore wing (8a, 61a, 193a, 198a).

^{*} Numbers with letter "a" refer to Joint Appendix.

This was the first day that this cargo was being discharged (6a).

These carpets were expensive and special care was required in stowing same (136a-137a, 205a). They were stowed on top of the palletized tea (11a). Because of the nature of the cargo, carpets should be stowed no more than 3 high. There should be a complete dunnage or plywood floor on top of the palletized tea below these carpets for the good of the tea, the carpets, as well as to have a solid working surface (127a, 128a, 246a). There are always spaces in a stow of palletized tea. This being Hatch No. 6 you could not have a solid stow because of the shape of the vessel (132a). Also, because of the scattering or spreading out of the palletized tea putting the pallets in a larger area than necessary, there were large holes in the stow (33a). It was necessary that plywood or dunnage be placed on the tea to bridge the holes or spaces in the stow of cargo (127a). The flooring should be solid (144a).

There was no dunnage or plywood used as a floor beneath the carpets,—nor was the cargo braced or secured for a voyage around the Cape of Good Hope (18a, 49a). On the voyage the ship encountered rough seas and there was heavy pitching and rolling of the vessel (232a). Cargo of palletized tea will move or shift in transit if there are spaces between skids (132a-1).

The stow in the wings was one tier high of palletized tea and about 3 feet high of carpets (12a, 40a). The square had a few pallets of tea and a few carpets thereon,—not uniformly stowed but looked as if just thrown into the hatch. Some of these carpets were on the floor of the hatch in the holes or spaces in the cargo (25a, 26a, 74a). "There

were some rugs on the floor and some rugs on top of the skids. *They weren't stowed*" (25a).

Chief Officer Rao testified that the New York cargo was in the forward one-third of the square of the hatch and the 38 skids of tea were stowed in both wings and in the square (196a). He admitted that "in the square there were 10-12 skids of tea which were spread all over and woolen carpets were on top of it, sir" (223a). On the voyage they encountered rough seas and heavy swells and the ship was pitching and rolling (235a). He examined the stow during the voyage for shifting of cargo (217a) and must have seen the unstowed, haphazard condition of the carpets indicative of the disturbed condition of the stow due to the voyage. He must have also known that skids will move or shift in transit if there were spaces. Yet if he had examined the stow during the voyage as he claimed, he should have seen the defective disturbed stow and should have at least warned the longshoremen in New York of the spaces in the stow or of the rough seas and the violent movement of the vessel on the voyage. This he did not do. Actually he did not remember very much of the conditions prevailing or the entire matter and was obviously guessing as to what the situation could have been (194a) and didn't remember anything about the stow (248a).

His testimony with respect to the direction, participation in and control of the loading operation is gone into in detail in Point II of this Brief.

After plaintiff and his fellow longshoremen cleared the square, he and a co-worker had to get on top of the carpets that were on top of the pallets of tea in the wing (11a, 12a). They were to roll the carpets towards the square

and hand them to the men in the square to be placed on slings to be raised out of the hatch (12a, 13a). In the performance of his work he stepped back to brace himself on the carpets, as the cargo was heavy, when one end of the carpet he stepped on went down into a hole in the stow causing him to lose his balance and fall into the hole (14a-15a, 100a-101a).

Q. Tell us how you got hurt. A. Well, we were handing these rugs down, me and my partner at that time, and I had to back myself to get into position to hand a rug down, because some of them were pretty heavy. A d we couldn't use hooks on the rug, we had to do everything by hand.

So I was positioning myself, where my left foot sank into a rug, into a hole, where I lost my balance, and I fell backwards to my side.

Q. When you say your left foot ~~sank~~, did anything happen to that rug? A. Yes, it sank with my foot. My foot sank into the rug that went into a hole.

Q. When you say it sank, what happened to the rug physically? A. It bended when I went down (14a-15a).

This hole was about 3-4 foot square and about 6 foot deep (100a-102a). It was not covered by any plywood or dunnage (18a).

In New York at the time of discharge the Chief Officer was in the hatch and he was there at the time of the accident (111a).

The only mention in the ship's log of dunnage for the day in question was that some dunnage was removed at 9:00 A.M. This was excess dunnage—small pieces—carried as cargo (258a).

The Motion for Judgment N.O.V.

The jury brought in a verdict for the plaintiff. Implicit in the jury verdict was a finding that the condition complained of was dangerous and shipowner had notice thereof. Defendant shipowner's motion for a judgment N.O.V. under Rule 50b of the Federal Rules of Civil Procedure was granted. The Court held "that there was no testimony presented which would permit an inference that the shipowner had any notice, actual or constructive, of the claimed defect as alleged in the complaint or on the basis of the testimony adduced at the trial" (350a).

The Court was in error.

In determining whether judgment N.O.V. should have been granted, the standard is whether the evidence is such that without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be only one conclusion reasonable men could have reached. The evidence must be viewed in the light most favorable to the party against whom the motion is made and he must be given the benefit of all reasonable inferences which may be drawn in his favor. *Simblest v. Maynard*, 427 F.2d 1 (2 C.A. 1970).

Defendant's motion is based on mistaken facts and a misconception of the law.

The motion was addressed solely to the issue of liability and defendant argued that without weighing the credibility of the witnesses and for the purposes of the motion it must be assumed that there was no plywood floor between the stow of rugs and the tea. They claimed that the law and the facts compel a judgment for the defendant. Their rea-

soning was that there was no testimony which "in any way tended to establish any duty on the part of shipowner to supervise the loading in India", nor did plaintiff show either actual or constructive notice to the ship. As a result, plaintiff, they claimed, failed to establish a prima facie case of negligence on the part of shipowner in connection with the loading of cargo. They likewise claimed that when the cargo was discharged in New York the ship's officers did not supervise the longshoremen in doing their work.

Defendant also claimed on said motion that unless plaintiff shows a duty on the part of shipowner to supervise the loading and/or discharging, plaintiff cannot recover. In their brief they made the point that since stevedore has the duty to provide a safe place to work "as a matter of law the shipowner is not liable for an alleged defect in the stowage of cargo".

The foregoing is not the law in this Circuit and has never been the law here. The duty to supervise is neither a condition precedent to a finding of negligence nor a condition precedent to a finding of actual or constructive notice.

The lower court properly charged the jury that the shipowner's duty is to exercise reasonable care to furnish plaintiff with a reasonably safe place to work. Such care may require inspection to ascertain hazardous conditions and to correct them, particularly where they can foresee or anticipate that the discharging longshoremen will necessarily be exposed to harm because of the defect in the stow which constitutes a trap. In determining the question of foreseeability shipowner is required to take into account the type of cargo; the necessity for special handling; the unusual hazards created by the stowage; the problems to be en-

countered in the discharging of this cargo; the type of voyage the ship was to make with this cargo and the exposure and effect to be expected by reason of the seasons, seas and weather and the like. If shipowner had a reasonable opportunity to look it had a duty to see the condition of the stow and that it was being created and left on board their vessel. If shipowner had actual or constructive notice of a dangerous condition which could foreseeably have caused harm then they are liable to the plaintiff for failure to take corrective action and to give warning. This is so regardless of "no supervision".

In that connection the Court charged the jury: "A defendant would have constructive notice of a dangerous condition if in fact such a condition existed and if it existed for such a period of time that the defendant had a reasonable opportunity and a duty to observe it. That is what is meant by constructive notice" (313a). The defendant did not take exception to such charge and rightfully so because the shipowner does have the duty to look and to see (observe) under the circumstances.

The Court likewise charged the jury: "In that regard, the shipowner has no duty to supervise any loading or discharging work performed by any stevedoring company or its employees including the plaintiff" (310a). It is submitted that that is not a correct statement of law. Historically, the ship's crew would do the loading and unloading and such activity would be under the supervision, direction and control of shipowner. Presumably, shipowner could delegate the supervision of the loading and unloading to a stevedore in which event, if complete control of such activity is placed in the hands of the stevedore then shipowner would not have actual or constructive notice since

they and their crew would either not be on board ship or would not be in a position to even observe the activity. When shipowner does not turn over complete supervision and control to a stevedore they retain a degree of control and supervision which is enough to impose liability. The facts in our case on appeal as set forth herein show clearly the extent of control, supervision and participation retained by shipowner and engaged in by shipowner and its employees.

Therefore, the bald charge to the jury of no duty to supervise is incorrect as stated by the Court. As long as shipowner retained control or participated in the work, their duty was a continuing one, that is, their duty was to exercise reasonable care even after the stevedores came on board.

In speaking of the duty to supervise the real question becomes not whether they were obligated to supervise but did they do so; to what extent did they agree to retain supervision and control by contract; and what degree of supervision and control was exercised by shipowner, by custom, usage and practice.

The defendant also confuses the duty to supervise with the duty to observe and reasonable opportunity to observe. This confusion between supervision and notice led them into the error of claiming that the duty to supervise is a prerequisite to a finding of negligence.

The defendant also made much in its motion of the fact that plaintiff did not object to the Judge's Charge with respect to the duty to supervise. Defendant is somewhat confused, however, in the import of the failure to object. Plaintiff is satisfied with the jury finding under the Charge

as given and hence does not quarrel with the contents of the charge as it affected the jury finding. A party takes an exception to a charge to protect his right to appeal.

The defendant now wishes to take advantage of plaintiff's failure to take exception when plaintiff is not complaining about the result of the charge. The defendant's position is untenable. The best that can be said for them is that they had a more favorable charge than they were entitled to and they still lost. The jury, following the instructions of the Court, determined the facts, decided the credibility of the witnesses and recognizing the degree of control and participation by shipowner in the stevedoring operation, concluded that a dangerous condition existed, that shipowner knew or should have known of the condition, and that they were negligent.

It should be pointed out that the degree of control retained by shipowner necessary to hold them liable for a dangerous condition is not great under the law. See *West v. The United States*, 361 U.S. 118 (1959).

POINT I

Where there is a latent condition on board ship:

1. Shipowners' duty of care is as set forth in Section 343 of the Restatement of Torts (2d).

2. Shipowners' duty is to inspect the vessel and stow to discover its actual condition.

3. Shipowners' obligation to discharging longshoremen to inspect the cargo starts at the time of loading the cargo when it can foresee danger.

In *Napoli v. Hellenic Lines Ltd.*, 536 F.2d 505, this Court stated:

As we proceed with our task of adopting appropriate land-based principles of negligence for application under the LAHWCA, we would be lacking in wisdom if we turned our backs on the changes which increased social awareness has brought about in traditional concepts of liability. Accordingly, we believe that where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in § 343A of the Restatement of Torts above quoted.

In doing so they adopted the Modern view as expressed in the Restatement of Torts.

The rationale of the *Napoli* decision is equally applicable to a latent condition. Section 343 of the Restatement of Torts 2d, pertaining to latent conditions states as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

In the Comment under that section in the Restatement there is set forth that Section 343 and 343a should be read together but it is made clear that 343a is a limitation on the liability stated in 343. It is, therefore, obvious that where a latent condition is involved, the shipowner's duty is at least as great as that referred to in *Napoli* which came under Section 343a.

Furthermore, in said Comment under Paragraph b the Restatement sets forth:

" . . . an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their con-

dition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

Under Comment d it states:

What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.

Thus, shipowner must exercise care for the purposes of protecting the life and limb of those coming on board the vessel to work thereon. As part of their duty to exercise care, it is incumbent upon them to make inspections of the activity on board the vessel and the changes, like stowage, being made therein. The shipowner can and should know and anticipate that after the cargo is stowed in another port that the vessel would arrive in New York and longshoremen in discharging the cargo would necessarily have to stand upon and work with said cargo. At what point should shipowner make such inspection? If he waits until the time of the accident, obviously that would not prevent an accident. If he waits until just before the longshoremen board the vessel at the port of discharge, shipowner would not know of a latent defect in the cargo such as holes therein covered or masked by other cargo thereon. The only sensible approach is to require the shipowner to make such inspection at the time when defects in the stow would be readily visible and correctable. This is so particularly where shipowner knows that there is a pe-

culiarity in the cargo itself, the type of stow, and precautions that have to be necessarily taken, and if not, such cargo could not be discharged in safety. Thus, the duty to observe and inspect the condition of the stow is squarely on the shipowner not only at the time of discharge but at the time of the loading as well.

In latent situations, if the shipowners were relieved of their obligation and duty to inspect and ascertain the condition of the stow at the time of loading, it would relieve them of their obligation to furnish a safe place to work. Shipowners in effect claim they can never be held liable for a defective condition of the stow which is latent at the port of discharge even though they carelessly ignored that which they could readily have ascertained and corrected when loading. To permit shipowners to evade their responsibility and to act with a reckless disregard for the rights and safety of those to come aboard to discharge when their officers and crew are in a position to observe and direct corrective action is contrary to the intent of Congress.

The Congressional Committees' reports pertaining to the Amendment to the LAHWCA specifically stated that shipowner continues to owe to a longshoreman the duty to furnish him with a safe place to work and requires shipowner to correct a dangerous condition if he knows or should have known the same; that the intent of Congress was not to relieve shipowner or permit the shipowner to relieve himself of responsibility for unsafe conditions on board a vessel; that Congress intended to provide an incentive to shipowner to avoid being negligent towards its longshoremen invitees. See *Landon v. Lief Hoegh & Co.*, 521 F.2d 756 (2 C.A. 1975), cert. den. 44 U.S.L.W. 3398 (January 12, 1976).

POINT II

Shipowner had actual and constructive notice of the latent defect in the stow by reason of his participation in and control of the loading operations. Shipowner's officers had the opportunity and duty to observe the cargo, the stowage and the condition of the stow.

The facts testified to by the Chief Officer Rao on behalf of the defendant shipowner show that the shipowner never gave up control of the vessel, the hatch in question and the loading operations. They actually directed the loading operations and participated therein. They created the very condition complained of and failed to take the necessary precautions to prevent the creation and existence of a dangerous trap. Their actions and participation was such that they knew or should have known of the dangerous condition and had both actual and constructive notice.

The nature and extent of the ship's participation is as follows:

(1) Rao made the stow plan before the loading operations began and gave orders to the stevedore as to how and where to stow the cargo. Thus—

Q. Who supervised this or who gave the orders to the stevedore labor that loaded this ship?

Mr. Lassoff: Objection, your Honor.

The Court: Were you present?

Q. Were you present on board when the ship was loaded? A. Yes, sir.

The Court: All right. Did you observe who gave the orders as to the loading?

The Witness: Pardon me, sir?

The Court: *Were you present when the orders were given as to how and where the cargo would be placed?*

The Witness: *Yes, sir.*

The Court: *Who did give those orders?*

The Witness: *I gave the orders to stevedores how to load the cargo, planning of the cargo.*

By Mr. Kain:

Q. When you load this cargo what do you do? A. First of all, when the cargo bookings come one of the representatives of the stevedores, they come on board and I tell them what the plan is, *I make the cargo stowage plan and I tell them how this is to be loaded, like what commodity goes where and in what space, depending on what space and commodity, keeping in view—*

Q. You tell them where to put it? A. Yes, sir, I give them the compartment, tell them this is the space for this (201a-202a).

(2) He made the cargo stowage plan after the cargo was loaded (18a) and testified that during the loading operations he was both on deck and in the hatch in question.

Q. Did you see this cargo when you made up the cargo stow plan, did you go around and view this cargo after it had been loaded in Calcutta? A. Yes, sir.

Q. Before the ship sailed did you make the rounds of the ship and look at the cargo, see where it was located? A. Yes, sir.

Q. After you made the rounds, is that when you made up this plan? A. Yes, sir.

Q. Were you at any time present *on deck when the longshoremen were loading* at Calcutta? A. Yes, sir.

Q. If you remember, *were you at any time present down in the hatches when the longshoremen were loading in Calcutta?* A. Yes, sir (199a-200a).

(3) He told the stevedores where to load the cargo.

Q. When you talked to the foreman before they started to load— A. Yes, sir.

Q. —the stevedore foreman in Calcutta, did you tell him where on the ship you wanted these various types of cargo? A. Yes, sir.

Q. In other words, did you tell him to put this block of tea in the forward end of the #6 hatch? A. Yes, sir.

Q. Did you also tell him to put these 96 rolls of carpet in the #6 hatch? A. Yes, sir (204a).

(4) He was required to take certain precautions in stowing and handling this cargo.

Q. Is a roll of carpet, based on your experience and your knowledge, Captain, an expensive item of cargo? A. Yes, sir, very expensive.

Q. Do you take certain precautions in stowing and handling this type of cargo? I am talking now about rolls of woolen carpet. A. Precautions? Well, specially in stowing in this case, stowed on top of the tea, a few pallets of tea— (204a-205a)

(5) His duty in Calcutta where the cargo in question was loaded was to load the cargo as he planned and instructed the stevedores, to have ship's crew maintain the vessel, and ship's officers were assigned to cargo watch.

Q. What did you do in Calcutta? A. Well, in the port normally the duties of the chief officer, *my duty, is to load the cargo*, load or discharge the cargo, *as I have planned and instructed*, as instructions given to the stevedores, and *instruct my duty officers to see* that there is no pilferage, there is no broken or damaged cargo, and besides cargo we have to attend to the moorings, the gangway.

* * * * *

Q. Anything else? A. Then I instruct my bosun to carry out maintenance, I give him the daily work, to look after the maintenance, and also the welfare of the crew and officers.

Q. Do you have or did you have in December of 1973 any of your junior officers—I am referring now to the deck department—who were assigned to a cargo watch? A. Yes, sir (211a-213a).

(6) When ship's officers were on cargo watch they were required to look, see and observe the cargo and stowage, and if they observed any defect in stowage, damage to cargo, or improper stevedore method, Chief Officer Rao had the duty to talk to anyone in charge of the hatch involved pointing out stevedore's mistakes and have them rectify it.

Q. Would you tell me, first of all, how many of your junior officers were assigned to cargo watches? A. Two, sir. Second officer from six evening, 6:00 p.m. to 6:00 a.m., and third officer and me during the day, from 6:00 a.m. to 6:00 p.m.

Q. If I understand you correctly, you and the third officer were on watch? A. Together.

Q. And the second officer was on watch when you went off watch? A. Yes, sir.

Q. In December 1973 when you were on watch did you make the rounds of the ship during stevedoring operations loading or discharging operations? A. Yes, sir (213a).

* * * * *

Q. In December 1973, when this ship was being loaded, specifically in Calcutta I am referring to, were your ship's officers under orders to report to you any defects which they observed in stowage or any damage to cargo being loaded or any improper stevedoring method which they observed? A. Yes, sir.

Q. They did have such orders? A. Yes, sir.

* * * * *

Q. Would it have been your duty, had you received such a report, to do something about it? A. Yes, sir (214a-215a).

* * * * *

Q. When you had such a complaint what was the procedure, how did you take this up with the stevedore? A. Well, I sent for the representative, the superintendent, the walking boss, any foreman who was in charge of the hatch in concern, the particular hatch, to tell them—to point out the mistakes and rectify it, *have them rectified* (215a-216a).

7. Rao knew that the ship would be sailing around the Cape of Good Hope and on the voyage the vessel was rolling and pitching heavily and he admitted that the cargo

was supposed to have been stowed adequately under the worse possible conditions to be encountered on the voyage.

Q. Incidentally, how did you get here on this voyage from India, what route did you take? Did you go through the Panama Canal, did you go around the Cape? How did you get here? A. We came around the Cape of Good Hope, sir.

Q. You came around the Cape of Good Hope in December, January? A. Well, towards the end of December, because we arrived Halifax the 17th of—it was the first week of January. First of January we were around the Cape of Good Hope, Cape Agulhas, which is the southernmost part.

* * * * *

Q. I will make it simpler. Does the log indicate that the ship was rolling and pitching heavily when you went around the Cape of Good Hope, sir? A. Yes, sir (232a).

* * * * *

Q. Incidentally, when you stow cargo for voyage at sea do you have to stow the cargo so it would be stowed adequately under the worst possible conditions you can encounter? A. Yes, sir (235a-236a).

(8) His duty was to see that the cargo was stowed as he told the stevedores to do.

Q. Is it part of your job as chief officer to see that the cargo is put in place in accordance with the stowage plan you drew up? A. Well, if I wanted a certain commodity in a particular section and if I find it is not there I tell the stevedore representative, "Look, this cargo, you have not put in the right place,"

say it is the forward end or the after end or the square of hatch. I point it out to them.

Q. My question is very simple. Is it part of your job to see that the cargo is stowed where you say it is to be stowed? Is that part of your job? A. Yes, sir (243a-244a).

(9) He knew that it was necessary to use plywood or dunnage on top of the tea before loading carpets thereon to make a level working surface or platform without holes or spaces for longshoremen to fall into.

Q. With regard to putting cargo in the square of the #6 hatch, when you put those drafts of tea there, and you knew you were going to load cargo on top of the tea, was it necessary for you to use either plywood or dunnage before loading cargo on top of the tea? A. Yes, sir (245a-246a).

* * * * *

Q. You mean so that the longshoremen would have a level platform without holes or spaces to go into, correct? A. Pardon me?

Q. When the longshoremen were working on top of there, to have a level platform so they wouldn't go into holes or spaces? A. That is right, sir (246a-247a).

(10) It was he who ordered plywood or dunnage to be used in the stowage of cargo and the shipowner supplied the plywood and dunnage.

Q. You had ordered the plywood or dunnage or whatever was put there to be put there? A. Yes (247a).

* * * * *

Q. Did you supply the plywood to create that floor?

A. The plywood belonged to the ship.

Q. I am asking you before the plywood was put on top of the skids where did it come from? A. It was lying on deck, sir, abreast #6 hatch (260a).

(11) If he advised the longshoremen to use dunnage or plywood to make a floor and they failed to do so, it was his responsibility to stop them and it was his responsibility to see that the cargo was stowed properly and protected.

Q. Maybe you didn't understand my question. I asked you where you would advise the longshoremen to use dunnage or plywood to make a floor and you saw that they were loading cargo on top of these skids of tea without making a flooring what would you have done?

* * * * *

A. Well, I would have told them to stop and use plywood sheets under the woolen carpets.

Q. So it would have been part of your responsibility to do that, would it not? A. That is to protect the cargo, yes, sir.

Q. And it was your duty to see that the cargo was stowed properly and protected? A. Yes, sir (262a).

(12) It was his duty to see that the longshoremen used plywood or dunnage under the carpets.

Q. And it was your duty to see that the longshoremen used plywood or dunnage to make that flooring, wasn't it? A. On top of the skids?

Q. Yes, that was part of your duty as a chief officer?

A. Well, that is the stevedore's—they have to do it. They know the procedures, and it is for me to correct them.

Q. I am saying it was part of your duty to see that that was done, is that correct? A. Well, I won't say it is part of my duty. This is just—as I said, this is just in order to protect the cargo.

Q. It is part of your duty to protect the cargo, isn't it? A. That is right, sir.

Q. So it would be part of your duty to see that it was done, isn't that true? A. Well, in—I would say yes (263a).

From the foregoing the jury justifiably found that there was notice. Under the Court's charge that constructive notice was "reasonable opportunity and duty to observe" there was more than sufficient evidence showing opportunity and duty with respect to the stowage and condition of cargo. The verdict for plaintiff was amply justified. The lower court's decision on the motion for judgment N.O.V. was clearly erroneous.

POINT III

Defendant shipowner's faulty recollection of the evidence resulted in shipowner urging the lower court to determine the motion on a set of facts not in evidence. The trial judge adopted the incorrect facts which were urged upon it and as a result came to an erroneous conclusion on the motion.

The defendant, in support of its motion for judgment N.O.V. cited four (4) cases, none of which refers to or had the benefit of the *Napoli* decision nor do their fact situations help shipowner. The fact situations are completely opposite to that found in our case.

Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal., 1974) involves the unloading of pipe. An improper method of discharging caused a load to spill. The stevedore chose the method and was to supply "on the spot dunnage" but did not do so. There was nothing unusual about the stow. The Court stated that the method of unloading was not the safest but the stevedore chose the method and the shipowner could not have made the stevedore use a different method. The stevedore chose not to use "on the spot dunnage". There was also no evidence that the shipowner knew of the method of unloading nor did it have authority to change the procedure if it discovered the danger. In substance, this was operational negligence on the part of the stevedore who was required to supply its own dunnage and the shipowner had divested himself of all rights to designate or change the method or manner used by the stevedore whose own employee was injured in the course of negligent operation.

The Court held that the duty to furnish a safe place to work was not non-delegable.

Thus the Ramirez Court would have held shipowner liable on the facts testified to in our case.

Citizen v. M.V. Triton, 384 F. Supp. 198, is distinguishable from the facts in our case in that plaintiff's employer was in complete control of the method of stowing and the working conditions of the cargo hold were determined by the stevedore. The accident occurred in the course of such stowing.

Defendant also cites *Bess v. Agromar Line*, 518 F.2d 738, 4 C.A. 1975. There plaintiff was injured while loading cargo of bales. Because of uneven size there was space between the bales. He requested plywood to make a better work surface. The request was made of the stevedore but no dunnage was supplied. He was injured when he went into a space. The Court stated that the vessel was a safe place to work when turned over to stevedores and the crew was absent from the vessel during the entire loading operations. "The allegedly unsafe condition was the result of the loading process which was under the sole control of the independent stevedoring contractor. The crew of the vessel and its owner were not aware of the allegedly unsafe condition and could not reasonably have learned of it" (p. 742).

Plaintiff further claimed in that case that shipowner had the duty to provide suitable plywood dunnage to be used in covering the bales and breached that duty thereby contributing to the unsafe condition. The Court held that that theory of liability was good but could not submit it to the jury because there was no evidence before the Court that defendant owed any duty to provide dunnage or make it

available or the practice in the trade was for the ship to supply dunnage.

In our case that is exactly what the evidence shows, and the Bess Court considered that a good liability.

Finally, in *Teofilovich v. D'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 there were dunnage boards under a crate too close to each other so as to act as an "axle" instead of a stabilizer and so caused the crate to tilt. Plaintiff did not know whether the dunnage was improperly aligned before the longshoremen began working the stow or whether the alignment was changed by their work with a forklift during discharge. No one from the ship's crew was allowed in the hatch during loading or discharge. The Court stated that plaintiff had failed to introduce evidence that an officer "had a duty to inspect minute details of a stow" and also failed to prove the defect in the dunnage existed before the vessel turned control of the hatch over to the stevedores.

The Court's holding was based on the condition of the stow due to "minute details". In our case the failure to use any plywood or dunnage in the stow is not a minute detail. The evidence shows that the use of plywood or dunnage is the very essence of safe and proper stowage of this cargo. Furthermore, the defective stow existed before the vessel arrived in New York and was created at the time of loading the cargo.

Defendant shipowner urged the Court that based on the facts in evidence the foregoing cases were applicable and there was no notice proven and so no negligence. Defendant's recollection of the testimony was faulty. Their motion papers were replete with erroneous statements which could not be corrected until the Minutes of the trial were

obtained. For example: They argued that there was no testimony showing that shipowner was required to have a ship's officer inspecting minute details of the stow or to be present at the hatch in question at all times during loading (but the testimony does show that ship's officers were on cargo duty to inspect as the loading proceeded to see that the longshoremen performed their work properly and as directed by the Chief Officer); that shipowner had no duty to supply dunnage or plywood flooring over the pallets of tea upon which rolls of rugs were stowed (but the testimony was that shipowner was obligated to supply the dunnage or plywood for such floor and before such lumber could be used it required permission from the Chief Officer); that the shipowner did not supervise the stevedore (but the testimony showed the Chief Officer prepared the stow plan and told the stevedore where and how the cargo was to be stowed so that spacing between the skids of tea perforce created spaces in the stow); that it was impossible to ascertain any alleged defect in the stow from the time the stow of rugs was placed over the tea in India until discharge in New York (but the testimony showed it was not impossible since carpets on the voyage shifted or fell into holes of the stow so that they were with one end down in a space and the other end up which should have indicated to shipowner that there were spaces in the cargo that no plywood or dunnage covered); that the Chief Officer was not down in the No. 6 Hatch observing the stevedore doing its work and had no duty to do so (but the testimony was that part of the Chief Officer's duties was to be on deck and be in the hatch during the loading operations and was in the hatch); that shipowner did not participate in the loading (but the testimony was that not only did the Chief Officer tell them where and how to stow various items, but also gave permission after

consulting with him as to the placing of dunnage or plywood on cargo and furthermore, if not stowed properly or as he directed, he would notify the foreman in charge of the hatch who would have to correct the stowage and conform to the Chief Officer's instructions); that the ship's log with entries relating to severe weather conditions and heavy seas during the voyage was irrelevant to the issues (but the testimony shows that the cargo had to be stowed and braced to be adequate under the worst possible conditions to be encountered but there was no bracing and there were spaces in the stow with insufficient pallets of tea in too big an area and as a result shifting of cargo should have been anticipated).

The defendant shipowner's faulty recollection of the testimony repetitiously urged upon the Trial Judge resulted in the Court adopting shipowner's version of the facts. As a result the Court held there was no evidence of notice and hence granted judgment N.O.V.

The Trial Court erred in adopting the shipowner's mistaken version both as to law and fact. The result was a miscarriage of justice. The testimony hereinbefore set forth as it pertains to notice clearly shows that there was no reason to grant judgment N.O.V.

CONCLUSION

The Order granting judgment N.O.V. should be reversed and the case remanded back to the lower court with instructions that the verdict and judgment in plaintiff's favor be reinstated.

Respectfully submitted,

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MORRIS CIZNER
of Counsel

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Brief is hereby admitted
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